

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated 9.2.2007

Coram

The Hon'ble Mr.Justice P.K.MISRA

and

The Hon'ble Mr.Justice R.SUDHAKAR

O.S.A.No.194 of 2001

MARS INCORPORATED,
6885, Elm Street,
McLean,
Virginia 22101-3883,
United States of America,
represented by
Power of Attorney Agent,
Mr.A.Arulselvan. Appellant/Plaintiff

vs.

MARES CONFECTIONERIES P. LTD.,
No.7, 5th Cross Street,
CIT Colony, Mylapore,
Chennai-600 004. Respondent/Defendant

Appeal filed under Order XXXVI Rule 1 of the Original Side Rules read with Order 41 Rule 1 Civil Procedure Code against the Judgment and Decree dated 9.4.2001 and made in C.S.No.220 of 1995 on the file of this Court.

For appellant : Mr.A.A.Mohan

For respondent : Mr.K.Azhagu Raman

JUDGMENT

R.SUDHAKAR, J.

The appeal is filed by the plaintiff in C.S.No.220 of 1995 against the Judgment and Decree dated 9.4.2001 of the learned single Judge of this Court.

2. The parties are referred to as per their rankings in the suit.

3. The appellant/plaintiff filed the suit for granting (i) a perpetual order and injunction restraining the defendant, their servants, agents, representatives and assigns from infringing plaintiff trade mark "MARS" by use of trade mark "MARES" or any mark similar to plaintiff's trade mark "MARS", (ii) a perpetual order and injunction restraining the defendant, their servants, agents and assigns from passing off the defendant's goods and business as and for the plaintiff's goods and business by use of "MARES" as a trade mark and/or as part of corporate name and trading style by the defendant or by use of any word similar to the plaintiff's trade mark "MARS" as a trade mark and/or as part of trading style by the defendant or in any other manner whatsoever, (iii) a preliminary decree in directing the defendant to render account of profits made by it by the use of "MARES" or any word similar to "MARS" as a trade mark and/or as part of trading style and (iv) directing the defendant to surrender to the plaintiff for destruction of all goods, cartoons, labels, containers, blocks, dies, moulds bearing the word "MARES" or any word similar to "MARS" as a trade mark and/or part of trading style and corporate name by the defendant.

4. As per the plaint averment, the case of the appellant/plaintiff is that the plaintiff is a renowned manufacturer and merchant in various types of foodstuff including non-medicated confectionery, chocolates and snack foods. Plaintiff is a world leader in branded snack foods, petcare products, main meal foods, electronic payment systems and drinks vending. Snack foods, and in particular confectionery was the plaintiff's first business from 1911. Plaintiff's snack foods are enjoyed in over one hundred countries including India. Plaintiff is the registered proprietor in India of the following among other trade marks:-

TRADE MARK	NUMBER	CLASS	GOODS
MARS	3685	30	Chocolates
MARS (STYLISED)	405616	30	Confectionery, biscuits and chocolates
MARS (STYLISED)	405656	30	Confectionery, biscuits and chocolates

Plaintiff owns the world's four biggest confectionery brands, of which one is the trade mark "MARS". The goods under the trade mark "MARS" as well as the plaintiff's other products are widely advertised in magazines and newspapers, many of which are sold and read in India, on radio and on television. Plaintiff promotes its

products by an extensive involvement in sports. It was the official sponsor of the Barcelona Olympics in 1992 and "MARS" was the official snack food at the 1990 World Cup in Italy and all the said sporting events received wide television coverage in India and were viewed by millions of viewers in all parts of the country. The goods bearing the trade mark "MARS" have been selling extensively in Indian Sub-continent countries as well as in other South-East Asian countries, such as China, Hong Kong, Japan, South Korea, Thailand, Indonesia, the Philippines, Singapore, Malaysia and Taiwan. Goods under the trade mark "MARS" are available in India in duty free shops at the international airports, in shops located in the Haryana State Tourist Complexes and in shops in and along routes visited foreign tourists and in cities of tourist interest all over the country and direct sales have also been made through "grey channels" in India. By virtue of the excellent quality of the goods sold thereunder, the trade mark "MARS" has become exclusively identified with the plaintiff and its goods worldwide. Plaintiff has established a very wide reputation among the Indian Public. It is further stated that on 11.1.1989, the respondent/defendant, filed an application with the Registrar of Trade Marks for registration of the trade mark "JOOCY BURST" in its name in respect of chewing gum, bubble gum and confectionery (non-medicated). The application was numbered 503728 in class 30. The said application was advertised in the Trade Marks Journal No.1056 dated 1.6.1993. Plaintiff filed a notice of opposition against the defendant's aforesaid application under Section 21 of the Trade and Merchandise Marks Act, 1958 inter alia on the ground that the trade mark "JOOCY BURST" in respect of which the defendant was seeking registration was deceptively similar to the plaintiff's registered trade mark "STARBURST". The said opposition was taken on record and numbered Mas-2924 in the office of the Registrar of Trade Marks at Madras. On 28.1.1994, the plaintiff by its attorneys Messrs.Lall Lahiri & Salhotra sent a notice to the defendant calling upon the defendant to cease and desist from using MARES as part of its trading style and/or as a trade mark and to withdraw its application number 503728 for the trade mark "JOOCY BURST". Since no reply was received, the attorney of the plaintiff sent a reminder to the defendant. On 7.4.1994, the plaintiff's attorney received a letter from the defendant through their advocates, in which all the allegations made in the plaintiff's letter dated 28.1.1994 were denied. Defendant also refused to withdraw its application for registration of the trade mark JOOCY BURST or change its trading style to remove the word MARES therefrom or to confirm that MARES would not be used as a trade mark on foodstuffs such as non-medicated confectionery or similar goods. On 19.8.1994, plaintiff's attorney received an order dated 10.8.1994 of the Assistant Registrar of Trade Marks in the said opposition No.MAS-2924 whereby it was stated that "that the applicants having desired to withdraw their application through their counsel's

letter dated 27th July, 1994; IT IS HEREBY ORDERED THAT Application No.503728 shall be treated as withdrawn and the opposition thereto bearing No.2924 therefore abates." Plaintiff was also awarded costs of Rs.250.00.

5. It is further stated in the plaint that the word "MARES" which forms the most prominent and distinctive portion of the defendant's trading style and corporate name is deceptively similar to the plaintiff's trade mark and trading style "MARS". Defendant is trading in the same goods as those in which the plaintiff's trade mark and trading style "MARS" has acquired a world wide reputation. The use of the trade mark "MARES" by the defendant as part of its trading style is likely to cause confusion and deception amongst the trade and the public that the defendant is in some manner connected with the plaintiff. The use of the word "MARES" by the defendant amounts to infringement of the plaintiff's registered trade mark "MARS". By using "MARES" as its trading style, the defendant is seeking to pass off its goods as and for the goods of the plaintiff. Defendant is carrying on business under the name and style of "MARES CONFECTIONERIES P. LTD. in Madras within the jurisdiction of this Court. The damages to the plaintiff's goodwill and reputation caused by the use of their trade mark by the defendant cannot be measured in terms of money. For the aforesaid reasons, the plaintiff filed the suit for the relief stated above.

6. Defendant in its written statement has stated that the defendant is unaware about the alleged popularity of the plaintiff all over the world including India. As far as India is concerned the plaintiff is practically unknown and the Director of the defendant had heard of the plaintiff only at the commencement of the present dispute. Defendant's company was incorporated under the Indian Companies Act, 1956 on 26.5.1982 with the certificate of incorporation bearing No.9403 of 1982. Defendant's organization had been created for the purpose of market research activities and the name also was taken therefrom, viz., "MARES" (the letters "MA" to indicate the word "Market" and the letters "RES" to indicate word "Research"). "MARES" was initially a partnership firm having its office at No.13-A, Sriram Nagar West, Madras-600 018 and the above firm was carrying on business in the manufacture and sale, import, etc., of Lollipops, Chocolates, etc. and had also been granted an Import licence under the Government of India, Ministry of Commerce and Industry Order No.17/55 dated 7.12.1955, as subsequently amendment issued under the Imports and Exports (Central) Act 1947 (XVIII of 1947). The partnership firm MARES subsequently became a Private Limited company, with the name "MARES CONFECTIONERIES PRIVATE LIMITED. Clause III(A) of the Memorandum of Association of MARES CONFECTIONERIES PRIVATE LIMITED, indicates the main objects of Company as follows:-

(1) To manufacture, buy, sell, import and deal Lollipops, Chocolates Toffee and all confectioneries and other bye products and ingredients generally used in those preparations, including Chewing Gums, Bubble Gum, gum base, medicated or otherwise.

(2) To act as manufacturer's representations, distributions, stockiest, in all types of goods and merchandise of which the company is authorised to carry on and

(3) To undertake and transact every kind of agency business and to engage in export promotions.

The items of confectionery manufactured by the defendant are marketed only under the trade mark belonging to Parry's Confectionery Limited, viz., "PARRYS". Several agreements have been executed between Parry's Confectionery Limited and the defendant, indicating the above arrangement over the last decade. Those agreements will reveal that from 1.11.1982 onwards, till the date of filing the written statement (28.1.1997), the property of the defendant has been marketed under the trade name of "Parrys Confectionery Limited(hereinafter referred to "PCL") having their registered office at "Parry House", Second Line Beach, Madras-600 001. The agreement also indicates that PCL have been providing the defendant the basic recipe and the process of manufacture relating to the products to be manufactured and in consideration of PCL permitting the defendant to use their trade mark, the defendant has been paying PCL, royalty as agreed upon between them. These agreements cover all the products of the defendant including Lollipops, Cool Mints, Vox, Mari stick, etc. Defendant manufacture confectioneries, which are then marketed by Parry's Confectionery Ltd., under their trade name and brand name "Parrys". The wrappers containing the product will indicate that the product in question does not carry the defendant's name as its brand name, but only indicate the name of the manufacturer as the defendant, which is a statutory requirement. Therefore, MARES CONFECTIONERIES PRIVATE LIMITED is not a trade mark or a trade name, but is a Company registered under the Indian Companies Act 1956 and consequently there is no question of the defendant copying the plaintiff's trade mark "MARS" or infringing upon it.

7. It is further stated in the written statement that the withdrawal of application No.503728 will not in any manner strengthen the plaintiff's case. The present issue is totally different. As already mentioned MARES CONFECTIONERIES PRIVATE LIMITED is not a brand name or trade name and no item of Confectioneries, Chocolates, Bubble gum, Chewing etc., are marketed under that trade mark. That being so, the question of any confusion being caused does not arise. The product of the

plaintiff is not used in Madras City, much less in Tamil Nadu or the rest of India. The averments in the plaint that the goods under the trade mark "MARS" are available in India in duty free shops at International Airports and in shops in and along routes visited by Foreign Tourists as also in shops located in the Haryana State Tourist Complex besides in Cities of Tourists interest all over the country and direct sales had been made through "Grey Channels" in India, will not in any way help the plaintiff's case. Continuing its manufacturing operation by the defendant, no prejudice or loss will be caused to the plaintiff. Plaintiff may be very famous in the rest of the world, but the plaintiff has not made any impact either in Madras or the rest of India. Plaintiff acquired the trade mark "MARS" only in May 1983, while the defendant had been registered under the Indian Companies Act even prior to the above date. Plaintiff cannot prevent the defendant from functioning under the Corporate name MARES CONFECTIONERIES PRIVATE LIMITED, especially as the same had been incorporated under the Indian Companies Act, 1956, even before the plaintiff had acquired the trade mark MARS. Hence, he prays dismissal of the suit.

8. On the basis of the above pleadings, the following issues were framed on 10.2.1997 for consideration:-

(1) Whether the goods bearing the Trade Mark MARS have been selling extensively in the Indian Sub-continent?

(2) Whether the plaintiff has established a very wide reputation among the Indian Public?

(3) Whether the word MARES used by the defendant is deceptively similar to the plaintiff's trade mark MARS?

(4) Whether using the word amounts to infringement of the plaintiff's Trade Mark MARS and causing confusion and deception among the trade and public?

(5) Whether the plaintiff is a Registered Proprietor of the Trade Mark MARS under Nos.3685, 405616 and 405656?

9. The following additional issues were also framed on 29.3.2001 for consideration, 10 days before the pronouncement of the judgment:-

(1) Whether the power of attorney executed in favour of the applicant is valid and is subsisting?

(2) Whether the suit is maintainable?

10. Before the trial Court, C.K.Virman, Power of Attorney for the plaintiff was examined as P.W.1. One Boota Singh Dhillon, Finance Manager of Masterfood Middle East FZE was examined as P.W.2. Exs.P-1 to P-24 were marked on the side of the plaintiff. One S.Ram Kumar, a Director of the defendant company was examined as D.W.1 and marked Exs.D-1 to D-18 on behalf of the defendant.

11. Considering the above pleadings and also the oral and documentary evidence, the learned trial Judge came to conclusion that the plaintiff's goods having the trade mark 'MARS' have not been selling extensively in the Indian Sub-continent and the plaintiff has not established a very wide reputation among the Indian public, that the word "MARES" used by the defendant is deceptively similar to the plaintiff's trade mark "MARS", that using the word "MARES" by the defendant company amounts to infringement of the plaintiff's trade mark "MARS" and causing confusion and deception among the trade and public and that the plaintiff is a registered proprietor of trade mark "MARS" under No.3685 only. It also held that the power of attorney executed in favour of Virmani, who had signed the plaint, is not valid and not subsisting and hence the suit is not maintainable. Accordingly, the trial Court answered the issue Nos.1 and 2 and the additional issue Nos.1 and 2 against the plaintiff, while the issue Nos.3 and 4 are found in favour of the plaintiff and issue No.5 partly found in favour of plaintiff. Though issue Nos.3 and 4 are found in favour of the plaintiff and issue No.5 partly in favour of plaintiff, the trial Judge dismissed the suit, in view of the finding in respect of the additional issues 1 and 2 that the power of attorney given in favour of Virmani is not valid and not subsisting and the suit is not maintainable. Against the said Judgment, the plaintiff preferred this Original Suit Appeal.

12. The crux of the finding of the learned single Judge, which is relevant, is as follows:-

"12..... Mr.C.K.Virman is the constituted attorney of the board and duly authorised to sign and verify the plaint. The said Virmani examined as P.W.1 has stated in the chief examination that he was the power of attorney for the plaintiff company; that Ex.P1 was the xerox copy of the deed of power of attorney executed by the plaintiff in his

favour; that it was still subsisting and was not revoked at any point of time; that as per clauses 1 and 2 of Ex.P1, he was authorized to sign, verify and carry on any plaint or suit and he has signed the plaint and his signature in Ex.P1 was attested by a notary public; that he has signed and verified the same as plaintiff's constituted attorney. A perusal of Ex.P1 would reveal that the same was executed by R.A.Steele, Assistant Secretary of the plaintiff company. P.W.1 has categorically stated that he was not aware whether a board resolution was passed authorizing R.A.Steele to execute a power of attorney. No Board resolution authorizing R.A.Steele to execute the power of attorney has been filed by the plaintiff's side. It is a matter of surprise to see that P.W.1 has stated that in the year 1995 he signed the plaint without knowing whether the power under Ex.P1 has been revoked or not, as he did not receive any notice of revocation. Though P.W.1 who has verified and signed the plaint was examined by the plaintiff's side, he has not spoken to about anyone of the facts in the plaint.

13. The plaintiff has examined P.W.2 one Mr.Bootia Singh Dhillon, the Finance Manager, who was based at Dubai and who was working with different subsidiaries of the plaintiff company. According to P.W.2, the plaintiff company has executed the deed of power of attorney under Ex.P1 in favour of Virmani P.W.1 and it was signed by R.A.Steele, the Assistant Secretary of the plaintiff company. She has signed in the last page of Ex.P1. The signature in the last page of Ex.P1 has been notarized by a notary public in Sydney, Australia because R.A.Steele was working in Sidney, Australia for the plaintiff company. R.A.Steele was authorized to sign on behalf of the plaintiff and Ex.P1a is the certificate given by the notary public while Ex.P1b is the certificate issued by Almaza Shenouda of the Department of Foreign Affairs and Trade identifying the signature of N.B.Pappas. Ex.P1c is the attestation by the Vice Consul, Consulate General of India, Sydney. A perusal of Ex.P1 would clearly reveal that by the said

document AMAR RAJ RAJ LALL, ANURADHA SALHOTRA, CHAMUPATI KUMAR VIRMANI AND CHANDER MOHAN LALL were appointed as Attorneys jointly and severally in the name and on behalf of the plaintiff company and it was executed by R.A.Steele, the Assistant Secretary, Mars Incorporated. As seen from the document, she was only an Assistant Secretary of the plaintiff company on 22.6.93 when Ex.P1 was executed by her. No material is placed by the plaintiff to show that the said Assistant Secretary R.A.Steele was authorized to sign on behalf of the plaintiff company. It is contended by the plaintiff's side that the suit was filed in 1995 by the duly constituted attorney of the plaintiff viz., P.W.1 under Ex.P1 deed duly executed and attested known to law and especially under the provisions of Powers of Attorney Act. P.W.1 through whom Ex.P1 was marked has deposed that the plaintiff company is incorporated in U.S.A., but Ex.P1 was sworn to by a notary public in Australia and he has also added that he could not explain how Ex.P1 though executed by a company in U.S.A. was sworn to by a notary in Australia. It is pertinent to point out that the witness has also added that he did not know whether there was any board resolution authorizing R.A.Steele to execute the power of attorney. Curious enough that P.W.1 has stated that in the year 1995, he gave instructions to the counsel to prepare the plaint, but without knowing whether the power under Ex.P1 was revoked or not. Thus it would be clear that the plaintiff has not proved that the Assistant Secretary R.A.Steele was duly authorized by the plaintiff company to execute a power deed as found under Ex.P1. In the absence of the same, it cannot be held that Ex.P1 was a valid one in the eye of law. The plaintiff is unable to explain how Ex.P1 was sworn to by a notary in Australia while the plaintiff company is incorporated in U.S.A. It is contended by the plaintiff's side that P.W.1 was examined for the limited purpose of marking the document under Ex.P1 and identifying him as the power agent who filed the suit. Though Ex.P1 document is marked through P.W.1, he is unable to say that the said power was in force at the

time of the institution of the suit. While P.W.1 has not spoken any one of the facts or allegations found in the plaint, P.W.2 Mr.Dhillon, Finance Manager based at Dubai has been examined. From his evidence, as narrated above, it would be clear that he is not the competent witness to speak anything about either Ex.P1 document or it was in force at the time of the institution of the suit. It is surprising to note that he has sworn to an affidavit in Dubai in December 1999 to summon P.W.1 Virmani under application No.123/2000. Though it is contended by the plaintiff's side that the power that was executed in favour of Virmani was cancelled in 1999, there is no document of revocation or cancellation placed before the Court. As stated above, the suit was filed by P.W.1 stating that he was the constituted attorney of the plaintiff and duly authorized to sign and verify the plaint. Only on that undertaking the suit was taken on file, and he has filed an affidavit in that regard also. But he is not aware whether the power executed in his favour was in force at the time of the institution of the suit and he has not spoken to anyone of the facts found in the plaint. Thus it would be crystal clear that he does not know whether Ex.P1 document is in force or not. P.W.2 is not a competent person to speak about Ex.P1 document since he was neither connected to nor concerned with the document.

14. As stated above, Ex.P1 document was not an outcome of the resolution of the Board of Directors of the plaintiff company. Admittedly the said document was executed by one Assistant Secretary R.A.Steela. No resolution of the Board of Directors authorizing R.A.Steele to execute the power of attorney in favour of P.W.1 is placed by the plaintiff's side. The plaintiff company is incorporated in U.S.A. and Ex.P1 was sworn to by a notary public in Australia. Without any hesitation it has to be stated that Ex.P1 document is not a properly executed or valid document in the eye of law. The learned counsel appearing for the plaintiff would urge that it was a matter of internal management of

the company and at the time of the institution of the suit, P.W.1 has a valid power under Ex.P1 document. This contention cannot be accepted. The Court is of the view that in the absence of the resolution of the Board of Directors empowering P.W.1 directly or giving necessary powers to the Assistant Secretary R.A.Steele to execute such a power, the suit filed by P.W.1 was not competent. The initial infirmity what is noticed by the Court with regard to the maintainability of the suit was incurable. During the pendency of the suit, an application was filed by the plaintiff's side for issue of commission to examine Mr.C.K.Virman at Delhi. When the said application was opposed by the defendant, an additional affidavit was filed by Mr.Arul Selvan, stating that he was the duly constituted power of attorney of the plaintiff and C.K.Virman was no longer connected with the plaintiff and that in 1999, the plaintiff ceased to retain M/s.Lall Lahiri and Salhotra in which office C.K.Virman was working. It is pertinent to note that no document was produced evidencing the appointment of Mr.Arul Selvan as the constituted attorney of the plaintiff. After the dismissal of the commission application, P.W.1 was examined by the plaintiff. But he has not stated anything about the contents in the plaint. Even according to the plaintiff, the power executed in favour of P.W.1 was cancelled in 1999 and the power was given to one Mr.Arul Selvan and hence it would be abundantly clear that Ex.P1 even according to the plaintiff was no longer valid and in subsistence. Though it was contended by the plaintiff's side that one Arul Selvan was appointed as power holder, no application for substitution was filed either, or no power document was filed before the court. According to the plaintiff, at the time of institution of the suit in 1995, P.W.1 was holding the power and was conversant with the facts of the case. When the suit was taken up for trial that was on 10.8.2000, C.K.Virman though examined as P.W.1 had no power in his favour. His evidence (P.W.1) would indicate that he was not aware of the fact whether the power executed in his favour was in force and

apart from that he has not deposed anything about the plaintiff's case. The contention of the plaintiff that the removal of the attorney during the pendency of the suit shall not render the suit invalid can hold good in a case when properly constituted attorney is substituted in the place of the earlier attorney. The further contention of the plaintiff's side that P.W.1 was examined for the limited purpose of marking the document under Ex.P1 and identifying him as power agent who filed the suit and in his place P.W.2 who is equally competent was examined to prove the case, cannot be accepted. A perusal of his evidence would clearly show that he was all along in foreign countries and has been narrating all the things what has happened in and around the State of Madras.

15. After hearing the arguments, the case was suo motto reopened and aforestated two additional issues were framed and when the matter was posted for the evidence, if any, on the additional issues, an affidavit of Mr.Arul Selvan, a resident of Madras accompanied by a Photostat copy of a power of attorney was filed. But the said document was not marked in evidence and hence the court need not look into the same. The said Arul Selvan in whose favour the power of attorney was allegedly executed was not examined. Since the said Arul Selvan was not examined, the defendant was deprived of the right of cross examination and hence the contention of the plaintiff that the power of attorney executed in favour of the said Arul Selvan on the revocation of Ex.P1 power in 1999 is filed and hence it has got to be taken as the power subsisting has to be rejected as devoid of merits. It remains to be stated that Ex.P1 document has not been shown to be a properly executed document in the eye of law, that there was no substitution of the power when it was revoked by the company and thus the said power was not subsisting and the filing of an affidavit with a Photostat copy of a power of attorney without examining any witnesses to prove the same and mark the document cannot cure the defect. For all the reasons it has to be necessarily found that the initial infirmity

which continued till the end of the trail with regard to the maintainability of the suit was incurable and hence on that ground it has to be held that the suit is not maintainable."

12(a). As regards the issue Nos.1 and 2, the learned single Judge considering the documentary and oral evidence came to the conclusion that the plaintiff has not established its case that the goods were sold extensively in India and that the plaintiff's goods had a very wide reputation in India. Plaintiff had failed to prove the case by adducing satisfactory evidence.

12(b). On Issue Nos.3 and 4, the learned single Judge in paras 17 and 18 of the judgment held as follows:-

"17. Regarding the case of the plaintiff that the word MARES used by the defendant is deceptively similar to plaintiff's trademark MARS and the use of the same amounts to the infringement of the plaintiff's trademark MARS and causing confusion and deception among the trade and public. The plaintiff has relied on the evidence of P.W.2 and number of documents filed. It is not in controversy that the plaintiff is a registered proprietor in India with the trademark MARS with registration No.3685 as found under Ex.P3 and the registration has also been renewed and is valid and subsisting. From the documentary evidence adduced by the plaintiff's side, the word MARS forms most distinct and significant feature of the plaintiff's trade name and trading style. As rightly contended by the plaintiff's side, the word MARES used by the defendant is phonetically and visually similar to the plaintiff's registered trademark MARS and the defendant has merely added the vowel "E" to the plaintiff's trademark MARS. Ex.P12 series are the product wrappers of the MARS products and it is not disputed that they belong to the plaintiff. When Ex.P12 series are compared with Ex.D9 a letterhead of the defendant, it would be very clear that the defendant's MARES is deceptively similar to the trademark of the plaintiff, viz., MARS. Hence the contention of the defendant's side that both oral and documentary evidence would indicate that the word MARES used by the defendant is not at all similar to the plaintiff's trademark MARS

cannot be accepted. No doubt, using the word MARES by the defendant would cause confusion and deception in the mind of the trade and public. Pointing to S.29 of the Trade and Merchandise Marks Act, 1958, the learned counsel for the defendant would submit that the registered trademark would be infringed by a person who not being the registered proprietor of the trademark or a registered user thereof using in the course of a trade a mark which is identical or deceptively similar to a trademark in relation to any goods in respect of which a trademark is registered. But in the present case MARES viz., the defendant is not a trademark or a trade name."

"18..... It remains to be stated that the plaintiff viz., Mars Incorporated is shown as a corporation under the laws of the State of Delaware, U.S.A. and it is a registered proprietor in India with the trademark MARS with registration number 3685 which is valid and subsisting and thus the plaintiff company has registered its name MARS as its trade mark in India. It is admitted by the defendant that MARES was initially a partnership firm and subsequently became a private limited company with the name MARES Confectionery Pvt. Ltd., a company incorporated under the Indian Companies Act. D.W.1 has admitted that after incorporation of the defendant company, they started manufacturing Lollipops. In the instant case, the plaintiff has registered its trademark in India as MARS and the defendant are manufacturing those products with its company name MARES Confectionery Pvt. Ltd. Although the plaintiff's products bear the trademark MARS and the defendant is manufacturing its products and releasing them with its company name MARES Confectionery Pvt. Ltd., in view of the similarity involved, there is all likelihood of misleading the public into the belief that the defendant company is connected with the plaintiff company. Under such circumstances, without any hesitation the Court has to hold that there is an infringement of the statutory right of the plaintiff by using a similar name."

12(c). As regards the additional issue Nos.1 and 2, the finding of the learned single Judge in paragraphs 20 and 21 is as follows:-

"20. In view of the reasons stated and discussions made above, the Court is of the considered view that the plaintiff's goods having the trade mark MARS have not been selling extensively in the Indian Sub-continent and the plaintiff has not established a very wide reputation among the Indian public. The Court is of the further view that the word MARES used by the defendant is deceptively similar to the plaintiff's trade mark MARS, that using the word MARES by the defendant company amounts to infringement of the plaintiff's trade mark MARS and causing confusion and deception among the trade and public; and that the plaintiff is a registered proprietor of trade mark MARS under No.3685 only. In the light of the discussions made above the Court has to hold that power of attorney executed in favour of the applicant Virmani is not valid and not subsisting and hence the suit is not maintainable. Therefore the issues 1 and 2 and the additional issues 1 and 2 are found against the plaintiff, while issues 3 and 4 are found in plaintiff's favour. Issue No.5 is answered accordingly. Though the issues 3 and 4 are found in favour of the plaintiff and issue No.5 partly found in plaintiff's favour, the plaintiff cannot be given any relief in this suit, in view of the finding of this Court that the suit is not maintainable.

21. In the result, this suit is dismissed as one not maintainable, in view of the finding that the power of attorney given in favour of Virmani is not valid and not subsisting. Under the stated circumstances, there shall be no order as to the costs."

13. Though on merit of the case relating to claim of infringement of the plaintiff's trade mark "Mars" has been found in favour of the plaintiff, the present appeal has been filed only on the ground that by virtue of the additional issues 1 and 2 framed by the Court, the suit itself has been dismissed as not maintainable for the reasons set out above.

14. The main contention of the appellant/plaintiff in the grounds of appeal is as follows:-

"(5) Having found all the major issues in favour of the appellant/plaintiff, the learned Judge erred in dismissing the suit on a technical point which has not been pleaded in the written statement and no issues were framed originally on this point;

(6) The lower court ought not to have framed the additional issues after hearing the arguments of both sides and posting the suit for pronouncing of judgment suo moto, especially when the respondent/defendant had not taken this plea in the written statement;

(7) The additional issue No.1 suo moto framed by the lower court, whether the power of attorney executed in favour of the applicant is valid and is subsisting itself is erroneous;"

In support of this contention, the learned counsel appearing for the appellant/plaintiff would submit that the reason for the learned single Judge to hold that the power of attorney was not valid at the time when the said suit was filed and taken up for trial and P.W.1 was not competent to depose before the Court, was not correct. Primarily, it was contended by the counsel for the appellant/plaintiff that the power of attorney is a valid one, on the basis of which, the plaintiff/P.W.1 signed on the plaint and subsequently, the suit was prosecuted and the person who was deposed before the Court was also competent to depose about the suit claim. But, learned single Judge having held issue Nos.3 and 4 in favour of the plaintiff on merits of the case, has erroneously dismissed the suit as not maintainable only on procedural infirmity which the appellant/plaintiff do not admit.

15. Order XIV Rule (1) C.P.C., relating to settlement of issues and determination of suit on issues of law or on issues agreed upon, is as follows:-

"1. Framing of issues:- (1) Issues arise when a material proposition of fact or law is affirmed by the one party and denied by the other,

(2) Material propositions are those propositions of law or fact which a plaintiff must allege in order to show a right to sue or

a defendant must allege in order to constitute his defence.

(3) Each material proposition affirmed by one party and denied by the other shall form the subject of a distinct issue.

(4) Issues are of two kinds:-
(a) issues of fact,
(b) issues of law

(5) At the first hearing of the suit the Court shall, after reading the plaint and the written statements, if any, and after examination under Rule 2 of Order X and after hearing the parties or their pleaders, ascertain upon what material propositions of fact or of law the parties are at variance, and shall thereupon proceed to frame and record the issues on which the right decision of the case appears to depend.

(6) Nothing in this rule requires the Court to frame and record issues where the defendant at the first hearing of the suit makes no defence."

16. It is the specific plea of the appellant/plaintiff that the additional issues 1 and 2 are not issues relating to fact or law. Further, additional issues 1 and 2 were not raised by the respondent/defendant. The original power of attorney Ex.P-1 has been executed by a person duly authorized to execute the same. Further, relying upon certain documents, it is contended that the power of attorney has been attested before the Consulate General of India, Sydney. Therefore, it is a validly executed document, which cannot be rejected or disputed.

17. As regards the validity of Ex.P-1 which was doubted by the learned single Judge as to its execution at a country outside India, the learned counsel for the plaintiff drawing the attention of the Court to Sections 57 and 85 of the Indian Evidence Act, submitted that the document executed before the Consulate General of India, Sydney, should be accepted as valid. The presumption should be in favour of the plaintiff. He would rely upon the decision reported in AIR 1989 Delhi 144 (Rajesh Wadhwa v. Sushma Govil) Paras 13, 14 and 15. Learned counsel further relied upon AIR 2004 Punjab and Haryana 121 (Chanan Kaur v. Pakhar Singh), particularly to paras 9 and 10. Section 85 of the Evidence Act reads as follows:-

"85. Presumption as to powers of attorney.- The Court shall presume that every document purporting to be a power of attorney, and to have been executed before, and authenticated by, a Notary Public, or any Court, Judge, Magistrate (Indian) Consul or Vice-Consul, or representative of the (Central Government), was so executed and authenticated."

Learned counsel for the petitioner, therefore contended that the Court should presume that the power of attorney Ex.P-1 executed before the Indian Consulate General, Sydney, is validly executed and an authentic document. In the aforesaid decision, the validity of power of attorney executed outside India, was under challenge and relying upon the decision of the Supreme Court, it was held that the presumption should be in favour of the execution of the document.

18. Therefore, the learned counsel for the appellant/plaintiff relying upon the documents, viz., Ex.P1, photo copy of deed of power of attorney, executed by mars, Inc. in favour of Mr.C.K.Virmani; Ex.P1-a, photo copy of certificate given by Nicholas B.Pappas, Notary Public, Sydney NSW AUSTRALIA, to R.A.Steele, Assistant Secretary; Ex.P1-b, photo copy of certificate issued by Almaza Shenouda of the Department of Foreign Affairs & Trade, identifying the signature of Nicholas Basil Pappas, Notary Public, Sydney, New South Wales, Australia; and Ex.P1-c, photo copy of attestation by the Vice Consul, Consulate General of India, Sydney on Ex.P1-b and Ex,P20, photo copy of the certificate issued by the plaintiff's company at the Board of Directors Meeting held on 16.4.1999 appointing R.A.Steele an Assistant Secretary and authorizing her to execute power of attorney on behalf of the plaintiff corporation, to file and prosecute trademark suit and other intellectual property cases; would state that these documents clearly establish that the document Ex.P1 was a validly issued document and on the basis of the power of attorney, the plaintiff had signed the plaint. Therefore, the power of attorney Ex.P-1 cannot be rejected.

19. The learned counsel for the appellant/plaintiff submitted that the Court below having held in favour of the plaintiff on the main issues on merits of the case of the plaintiff, erred in dismissing the suit, as not maintainable on a technical plea that the power of attorney Ex.P-1 was not valid at the time of the trial of the suit, overlooking other factual aspects relating to the prosecution of the suit by persons concerned with the plaintiff's company. The learned counsel relied upon the decision reported in

A.I.R. 1997 Supreme Court 3 (United Bank of India -vs.- Naresh Kumar) to contend that the suit ought not to have been so dismissed on a mere technical plea.

20. Learned single Judge has held in para 12 of the judgment that "No Board resolution authorizing R.A.Steele to execute the power of attorney has been filed by the plaintiff's side". In para 13, it has been stated once again that "No material is placed by the plaintiff to show that the said Assistant Secretary R.A.Steele was authorized to sign on behalf of the plaintiff company". Further, in the very same paragraph, it has been held by the learned single Judge that "the plaintiff company is incorporated in U.S.A., but Ex.P1 was sworn to by a notary public in Australia" that "P.W.1 could not explain how Ex.P1 though executed by a company in U.S.A. was sworn to by a notary in Australia". Further, the learned single Judge holds that "the plaintiff has not proved that the Assistant Secretary R.A.Steele was duly authorized by the plaintiff company to execute a power deed as found under Ex.P1. In the absence of the same, it cannot be held that Ex.P1 was a valid one in the eye of law". In para 14 of the judgment, it has been held that "Ex.P1 document was not an outcome of the resolution of the Board of Directors of the plaintiff company". In conclusion in para 14 of the judgment, the learned single Judge once again holds that "The plaintiff company is incorporated in U.S.A. and Ex.P1 was sworn to by a notary public in Australia. Without any hesitation it has to be stated that Ex.P1 document is not a properly executed or valid document in the eye of law". It is also held that "The initial infirmity what is noticed by the Court with regard to the maintainability of the suit was incurable". The findings of the learned single Judge are contrary to the plaintiff's document relating to execution of the power of attorney Ex.P-1. Ex.P-20 is the photo copy of the certificate issued by the plaintiff's company at the Board of Directors Meeting held on 16.4.1999 appointing R.A.Steele an Assistant Secretary and authorizing her to execute power of attorney on behalf of the plaintiff corporation. It is on the basis of this document (Ex.P-20), Ex.P-1 was executed by the said R.A.Steele, at Australia.

21. Admittedly, the power of attorney Ex.P-1 had been executed in Sydney NSW Australia before the Indian Vice Consul, Consulate General of India, Sydney. Therefore, the finding of the learned single Judge that Ex.P-1 is not a valid document in the eye of law cannot be accepted. The finding of the learned single Judge that P.W.1 had not explained how the power of attorney was executed in Australia when the appellant/plaintiff's company was incorporated in U.S.A. is totally on a misconception of documents Ex.P1, Ex.P1-a, Ex.P1-b, Ex.P1-c and Ex.P20. Further, the execution of document before the Consulate General, the Indian High

Commissioner cannot be disputed. Ex.P-20 is the authorization issued in favour of R.A.Steele to execute a power of attorney and this was not considered by the learned single Judge and therefore, the learned single Judge has come to the conclusion that Ex.P1 was not validly executed. The evidence of P.W.1 C.K.Virman, will not be relevant in the facts and circumstances of the case as he is not the person who can speak about the execution of the document at Sydney NSW Australia. Therefore, his evidence does not in any way disprove the document in issue. The specific reason given by the Court to hold that the suit filed by P.W.1 cannot be accepted, is only on the ground that the resolution of the Board of Directors, empowering P.W.1 directly or giving necessary powers to Assistant Secretary, R.A.Steele to execute such power, was not available. Therefore, the initial infirmity as noticed by the Court is not correct. It is not the case of the plaintiff that P.W.1 was directly empowered by the Board of Directors. However, the document, viz., Ex.P-20, which has been lost site of by the Court clearly authorises R.A.Steele to execute such power in favour of P.W.1. The non-consideration of Ex.P-20 was a reason for the Court to hold as above. The learned single Judge has failed to appreciate Ex.P-20 which is supported by Ex.P1-a, Ex.P1-b and Ex.P1-c making it amply clear that the power of attorney was a validly executed document. In such view of the matter, the basis on which the learned single Judge came to the conclusion that Ex.P-1 was an invalid document cannot be accepted and such finding has to be set aside. The evidence of P.W.2 cannot be the basis to come to conclusion about the nature of the document Ex.P-1. P.W.2 was not there at that time. The fact that R.A.Steele, executed the document before the Vice Consul, Consulate General of India, Sydney is not disputed by anybody. When P.W.2 was not present at the time of execution of the document, it is obvious that he is not competent person to state about the execution of the document. The presumption of the execution of the document has to be accepted, in view of the provisions of law as has been extracted in the decision cited above by the counsel for the appellant/plaintiff. P.W.1 has signed and verified the plaint based on the power of attorney. It is of course true that the power of attorney was revoked subsequently, after filing of the suit. But, that by itself cannot make the suit as not validly instituted. It is not a case where the learned single Judge has discarded the case of the plaintiff on account of lack of evidence or on account of the fact that the persons who had deposed had no knowledge in the matter. Learned single Judge had dismissed the suit only on a technical view doubting the validity of the power of attorney. In our opinion, such conclusion of the learned single Judge cannot be accepted in view of Section 85 of the Evidence Act. Therefore, we hold that the suit was validly instituted and the reasons given by the learned single Judge is unacceptable. Consequently, Additional issues 1 and 2 have to be held in favour

of the appellant/plaintiff.

22. The learned single Judge while considering the additional issues 1 and 2 in paragraphs 14 and 15 of the judgment, referred to the affidavit of Sri Arul Selvan and the power of attorney issued in his favour consequent to the revocation of Ex.P-1 power of attorney issued to Sri C.K.Virmani. The learned single Judge rejected the subsequent power granted in favour of Sri Arul Selvan to come to conclusion that the suit was not properly laid. As regards the prosecution of the suit and the subsequent power of attorney in favour of Mr.Arul Selvan, the following grounds has been taken by the appellant/plaintiff:-

"27. The learned Judge erred in holding that no proper document was produced evidencing the appointment of Mr.Arulselvan as the constituted attorney of the plaintiff. The original power of attorney as well as a certified true copy of the power executed by the plaintiff to and in favour of Mr.Arulselvan was produced before the learned Judge and when the additional issues were framed. On a perusal and comparison of the original power of attorney with the attested true copy, the original power of attorney was returned to the counsel for plaintiff. The learned judge has ignored the power of attorney filed by the plaintiff to and in favour of Mr.Arulselvan, the constituted attorney."

"34. The learned Judge erred in holding that a Photostat copy of power of attorney in favour of Mr.Arulselvan was filed. The learned Judge has ignored the fact that the original power of attorney was filed before the learned Judge along with an attested copy of the power of attorney. The original power of attorney was compared and verified with the attested copy and then the original power was returned to the counsel for plaintiff. The power of attorney in favour of Arulselvan was not marked as it was filed after completion of arguments by counsel for both sides."

"35. The learned Judge erred in holding that the power of attorney executed in favour of Arulselvan is subsisting, has to be rejected as devoid of merits. The learned Judge has failed to appreciate that the power of attorney

in favour of Arulselvan was filed only to prove that even after the revocation of the power of attorney Ex.P1, executed in favour of P.W.1, a fresh power was executed by the plaintiff to and in favour of Arulselvarn. In any event, P.W.2, an employee of the plaintiff has appeared on behalf of the plaintiff with a proper authorization letter, produced before this Hon'ble Court. In the circumstances, the entire discussion on the power of attorney executed in favour of Arulselvan is not germane to the issues involved in the case and not relevant."

The counsel for the appellant/plaintiff relied upon Ex.P-24 dated 30.7.1999, letter of authority issued in favour of Boota Singh Dillon, P.W.2 to state that the evidence was tendered by a competent person and a person concerned with the plaintiff corporation. It was therefore, contended that at the time of the trial of the suit, in the absence of a valid power of attorney in favour of P.W.1, P.W.2 was authorized under Ex.P-24, to speak about the suit claim. In paras 17 and 18 of the judgment, while holding in favour of the appellant/plaintiff, the Court relied upon the evidence of P.W.2 and the documents filed in the plaint to come to conclusion that the plaintiff's trademark "MARS" had been infringed by the defendant. Further in paragraph 14 of the judgment, the learned single Judge held that P.W.2 is not competent to speak about the business of the plaintiff in India. When the Court accepts the case of the plaintiff based on the evidence of P.W.2 and on the basis of the documents filed in support of the plaint, it is not clear how the place of residence of P.W.2 will be relevant for the purpose of tendering evidence in the suit. It is not disputed that P.W.2 has been authorised to give evidence in terms of Ex.P-24. Such document also is not in dispute. In this background of the case as to what is the effect of the power of attorney granted in favour of Arul Selvan and whether it is necessary for the purpose of concluding the suit proceedings is a question which should have been considered in the light of the documentary evidence and the evidence of P.W.2. The learned single Judge while dealing with the case of the plaintiff on additional issues 1 and 2, has observed that the power of attorney granted in favour of Sri Arul Selvan was not marked and he was not examined as witness and therefore, the Court came to hold that there was no valid power at the time of filing the suit and thereafter. To such contention, the plaintiff/appellant has raised the plea in ground Nos.27 and 34, which have been extracted above. Since the evidence of P.Ws.1 and 2 were already on record supported by the documents filed and the plaintiff had proved the case on merits, there was no need to record the evidence of Sri

Arul Selvan at all. The power of attorney was taken in his favour only to show that at the time of conclusion of the suit proceedings, there was a valid power of attorney in favour of a person and the plaintiff is represented. As regards the evidence of P.W.2, he is a competent person as is evident from Ex.P-24, which has not been controverted by the defendant. In any event Mr.Arul Selvan also had the power of attorney executed in his favour and the same was before the Court. Therefore, the conclusion of the learned single Judge that there was no valid power of attorney to file and prosecute the suit is totally erroneous. In any event we have for reasons aforesaid held Additional issues 1 and 2 in favour of plaintiff and therefore, the subsequent events and discussions regarding the power of attorney in favour of Mr.Arul Selvan becomes academic. Once it is found that the plaintiff was the Proprietor of the trademark MARS and the defendant infringed the trademark and that action of the defendant was causing confusion and deception among the trade and public, the suit is bound to be decreed. The finding with regard to the validity of the power of attorney is rejected and we have no hesitation to hold that the suit was properly instituted and prosecuted.

23. On issue Nos.3 and 4, the learned single Judge held in favour of the plaintiff/appellant, which is the sum and substance of the case of the plaintiff/appellant. The suit should not have been dismissed on the ground that on the date on which the trial proceeded and evidence recorded, there was no power of attorney in favour of P.W.1. Such contention cannot be accepted in view of Ex.P-24 and specific plea of the plaintiff/appellant that the valid power of attorney was executed in favour of Mr.Arul Selvan. Therefore, the plaintiff was duly represented at the time of filing of the suit and at the time of trial as well. In any event, the defendant had not raised the plea in the written statement and there was no occasion for the Court to frame the additional issues 1 and 2.

24. At the time of hearing of the appeal, the learned counsel for the plaintiff/appellant submit that they are not pursuing the relief as sought for in paras 30(c) and 30(d) of the plaint.

25. For the aforesaid reasons, we are unable to accept the ultimate conclusion of the learned single Judge and such judgment is liable to be reversed and the suit is decreed.

26. In the result, the appeal is allowed setting aside the judgment and decree of the learned single Judge made in C.S.No.220 of 1995 dated 9.4.2001 with regard to additional issue Nos.1 and 2 and in other respects, the finding of the learned single Judge is confirmed. Accordingly, the suit is decreed as prayed for with

regard to prayer in paras 30(a) and (b) of the plaint and dismissed with regard to prayer in paras 30(c) and (d) of the plaint, as not pressed. In the facts and circumstances of the case, there will be no order as to costs.

Sd/-
Asst. Registrar.

/true copy/

Sub Asst. Registrar.

ts.

To

1. The Sub-Assistant Registrar,
Original Side, High Court,
Madras.

2. The Sub Assistant Registrar,
Judicial Department,
High Court, Madras.

1 cc to Mr. Ashok Menon, Advocate, sr. 8871

1 cc to Mr.A.A. Mohan, advocate, sr. 7968

O.S.A.No.194 of 2001

BV (CO)
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